

STATE OF MICHIGAN  
MACOMB COUNTY CIRCUIT COURT

COMERICA BANK,

Plaintiff,

vs.

Case No. 2014-1133-CK

JOHN MILKOVICH, JR.,

Defendant.

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OPINION AND ORDER

Plaintiff has moved for summary disposition pursuant to MCR 2.116(C)(10). Defendant has filed a response and requests that the motion be denied. Plaintiff has also filed a reply brief in support of its motion.

*Facts and Procedural History*

On August 12, 2004, Defendant entered into a “Fixed Rate Demand Note Agreement” (the “Note”) with Plaintiff in settlement of a 2003 lawsuit involving the parties. (See Plaintiff’s Exhibit B.) The Note required Defendant to make \$300.00 monthly payments to Plaintiff until the balance of \$131,282.53 was paid in full. (Id.) The Note also provided that if a default occurred a 6% interest rate would apply. (Id.) The Note also provided that Defendant would be required to reimburse Plaintiff for any and all costs and attorney fees incurred in having to enforce the Note. (Id.)

On July 21, 2005, Plaintiff’s representative sent a letter to Defendant advising him that he had breached the Note by failing to make a payment that had been due on May 31, 2005. In the letter Plaintiff also demanded payment in full of the remaining balance of the Note.

In or around August 2005, Defendant made a payment of \$1,200.00 towards the debt owed under the Note. In addition, Defendant continued to make payments through February 13, 2009.

On March 21, 2014, Plaintiff filed its complaint in this matter based on Defendant's alleged breach of the terms of the Note. On August 1, 2014, Plaintiff filed its instant motion for summary disposition. Defendant has filed a response and requests that the motion be denied. Plaintiff has also filed a reply in support of its motion. On September 22, 2014, the Court held a hearing in connection with the motion and took the matter under advisement.

#### *Standards of Review*

A motion under MCR 2.116(C)(10) tests the factual support of a claim. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). In reviewing such a motion, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Id.* Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.* The Court must only consider the substantively admissible evidence actually proffered in opposition to the motion, and may not rely on the mere possibility that the claim might be supported by evidence produced at trial. *Id.*, at 121.

#### *Arguments and Analysis*

In its response to the instant motion, Defendant contends that on or about July 21, 2005 Plaintiff demanded full payment of the balance due under the Note, that the demand was never rescinded, and that as a result Plaintiff's instant claims are barred by the 6 year statute of limitations set forth in MCL 440.3118(2). MCL 440.3118(2) provides:

(2) ... if demand for payment is made to the maker of a note payable on demand, an action to enforce the obligation of a party to pay the note must be commenced

within 6 years after the demand. If no demand for payment is made to the maker, an action to enforce the note is barred if neither principal nor interest on the note has been paid for a continuous period of 10 years.

While it is undisputed that this matter was initiated over 6 years after the July 21, 2005 demand was made, Plaintiff contends that the demand was constructively rescinded by allowing Defendant to cure the initial default and allowing him to continue making the required payments under the Note for the next 3 ½ years.

In this case, the Court is convinced that while the statute of limitations provided by MCL 440.3118(2) applies in this case, the 10 year limitations period rather than the 6 year period applies. While Plaintiff made a demand for payment of the remaining balance in 2005 it chose not to enforce the demand; rather, it allowed Defendant to catch up on the missed payments and to continue to make the required payments under the Note. Defendant now seeks to use Plaintiff's generosity in allowing him to catch up against Plaintiff. However, while the demand was not formally rescinded, the Court is satisfied that the actions of the parties clearly indicates that Plaintiff agreed to allow Defendant to pick up where he left off prior to his default rather than have to tender the entire balance in a lump sum. Accordingly, the Court hereby holds that the demand was rescinded. Consequently, pursuant to MCL 440.3118(2) Plaintiff had 10 years from the date of the last payment to commence this suit, which it indisputably did in this matter.

Further, the Court notes that Defendant's interpretation of the applicable statute could result in an absurd result. In particular, if Defendant had continued to make payments for 6 years after the demand was made and then ceased making payment Plaintiff would have been left with no recourse if the 6 year limitations period was applied. This is certainly not the result that the Legislature intended in promulgating the statute. Rather, the statute was intended to require a party making a demand to enforce their demand in a timely manner. In this case, Plaintiff, to

Defendant's benefit, did not pursue the demand in order to allow Defendant to satisfy the remainder of his obligations under the Note. While Defendant ultimately failed to hold up his end of the bargain, the Court is satisfied that Plaintiff should not be punished for Defendant's failure where their delay in pursuing this litigation was not excessive.

With respect to liability, Defendant has failed to provide any evidence contradicting Plaintiff's supported position that Defendant's last payment under the Note was in 2009. Consequently, there is no genuine issue of material fact that Defendant has breached the terms of the Note. Accordingly, Plaintiff's motion for summary disposition of its breach of contract claim must be granted.

#### *Conclusion*

Based upon the reasons set forth above, Plaintiff's motion for summary disposition of its breach of contract claim is GRANTED. The issue of damages remains OPEN. Plaintiff shall schedule an evidentiary hearing on the issue of damages. This Opinion and Order resolves the last claim and closes the case. See MCR 2.602(A)(3).

IT IS SO ORDERED.

/s/ John C. Foster  
JOHN C. FOSTER, Circuit Judge

Dated: October 6, 2014

JCF/sr

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